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No. 79-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS IN REPLY TO RESPONDENTS' BRIEFS

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BRIEF FOR PETITIONERS IN REPLY TO RESPONDENTS' BRIEFS

This brief of the petitioners (collectively "Milwaukee") replies to the briefs of the respondents, Illinois [1] and Michigan.[2]

[1] Illinois filed two briefs herein. The first was a typewritten brief filed pursuant to Supreme Court Rule 30.4(b), which prohibits subsequent changes other than references to the joint appendix and the correction of typographical errors. Illinois' first brief substantially exceeded the page limitation of Supreme Court Rule 34.3. On Illinois' motion for permission to file such overlong brief, unopposed by Milwaukee, Mr. Justice Stevens granted only half of the extra pages requested by Illinois, remarking that Illinois' typewritten brief failed to comply with either "the purpose or the letter" of the rules. Illinois, which had previously been accorded *two* extensions of time, used Mr. Justice Stevens' order as an excuse to *add new matter* and *substantially* rewrite its typewritten brief. Milwaukee believes the course taken by Illinois was totally improper and unauthorized, but hereby responds to Illinois' rewritten brief, believing it to be the brief that will be distributed to the Court.

[2] Michigan is an intervenor in this action only with respect to one very limited issue, the claimed accelerated eutrophication of Lake Michigan resulting from phosphorous discharges. The NPDES per-

ARGUMENT

I. ILLINOIS INAPPROPRIATELY AND INCORRECTLY ARGUES THAT ILLINOIS' COMMON LAW AND STATUTORY LAW ARE APPLICABLE.

Illinois' brief devotes many pages to an argument that the judgment below should be affirmed on the basis of Illinois' common law and statutes. *That issue is not before this Court.*

The Court of Appeals said:

> "But it is federal common law and not state statutory or common law that controls in this case, *Illinois* v. *Milwaukee, supra,* 406 U.S. at 107 & n.9, and therefore we do not address the state law claims." Pet. App. A-46 n.53.

Milwaukee's petition for certiorari challenged only that part of the Court of Appeals' decision which affirmed liability under the federal common law claim and required as a remedy the elimination of all overflows in Milwaukee's sewerage system. Illinois' petition for certiorari, which seeks consideration of its state law claims, has not been granted. (Illinois' Petition for Certiorari, Case No. 79-571, October Term 1979: see Issue 4 at 3 and Argument II at 26-30.) Supreme Court Rules 21.1(a) and 34.1(a) make clear that Illinois' state law issues are not properly before this Court. Milwaukee respectfully suggests that those portions of Illinois' brief dealing with questions of state law be disregarded; they should properly be stricken.

While it would be inappropriate to respond in detail to Illinois' state law arguments (impossible in the confines of a reply brief), Milwaukee feels compelled to point out that

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mits under which Milwaukee operates limit Milwaukee's phosphorous discharges to one part per million. Both courts below ordered the same phosphorous limitation. *Compare* P.Ex. 62 at Part II, Page 1, App. 372-373, Tr. 257 and P.Ex. 63 at Part II, page 3, App. 410-411, Tr. 257 *with* Pet. App. D-6 and A-48; App. 361. As Milwaukee is in any event bound by its permits on this subject, no response is directed to Michigan's brief other than as incidentally appears in other portions of this brief and Milwaukee's reply to the briefs of the respondents' supporting amici.

Illinois' major premise—that state law exists in the narrow field of controversies involving the conflicting interests of two or more states in interstate waters—is wrong!

The federal common law of interstate waters was developed in a series of cases dealing with the use or pollution of interstate waters. See, e.g., *Kansas* v. *Colorado,* 206 U.S. 46 (1907); *Missouri* v. *Illinois,* 200 U.S. 496 (1906).

Although this body of federal common law was developed initially in the context of disputes between states, its applicability has not been limited to state versus state cases. As this Court stated in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972):

> "Thus, it is not only the character of the parties that requires us to apply federal law. See *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 237 [Citations deleted.]. As Mr. Justice Harlan indicated for the Court in *Banco Nationale de Cuba* v. *Sabbatino,* 376 U.S. 398, 421-427, where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. [Citations deleted.] Certainly these same demands for applying federal common law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four states." 406 U.S. at 105n.6 (Pet. App. I-14n.6).

Similarly, *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938), was not a state versus state case, but did touch upon the basic interests of federalism. It was a state court case in which a Colorado corporation sued the Colorado State Engineer, challenging the engineer's apportionment of interstate waters between Colorado and New Mexico. The Colorado Supreme Court held that the Colorado corporation had vested rights in these interstate waters, based upon Colorado law. In reversing, this Court held:

> "[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." 304 U.S. at 110.

In *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), this Court momentarily seemed to abandon the federal common law of interstate waters. See 401 U.S. at 498n.3. However, in *Illinois* v. *Milwaukee, supra,* a unanimous Court made clear that federal, not state, law controls pollution of interstate waters and that the contrary indication in *Wyandotte* was a result of the Court's preoccupation with other matters in that particular case. See 406 U.S. at 102n.3 and 105n.7 (Pet. App. I-11n.3 and I-14n.7).

Illinois has now come full circle. When this cause was first before this Court in 1972, the Court asked the parties to brief the question, "Would Federal or state law govern the substantive issues sought to be presented for decision in original actions such as this one"? Illinois replied:

> "Plaintiff's unequivocal answer to the question posed is that *federal common law must rule the substantive issues of the case.*" Plaintiff's Brief Regarding the Applicable Law at 2, U.S. Sup. Ct. Case No. 49 Original filed December 9, 1970 (Emphasis in original.).

Illinois went on to argue that position:

> "Here ['even if . . . the complaint is judged by its face as not directly involving a state'] the interests of two states are in harsh competition with each other, political subdivisions of one state claiming that they may use, in the exercise of their public health functions, interstate waters and public water supplies in one way, the other state complaining that such use is inimical to its public health because it contaminates those very waters and constitutes a danger to the life of its citizens. Such conflicting state interests spawning virulent controversies between the antagonists do not lend themselves to, and cannot be settled by, the application of narrow state law principles which by their very nature are fashioned by, and attuned to, the parochial interests of the state whose law is applied. Controversies of that nature must be determined and judged by a law which transcends the local rules of each state and adopts norms that embrace within their purview the sovereign interests of the affected states, viewed in the light of a sound and viable federal system." *Id.* at 7-8.

This case in no way concerns Illinois' authority over dischargers who discharge within its geographical sovereignty. (Section 510 of FWPCA (§ 1370) is therefore inapplicable. See p.8, *infra.*) Rather, this case involves alleged interstate water pollution. The issues raised transcend state lines and affect the interests of several states. Consequently, the law which governs is federal law, not state law.

II. IN THIS CASE THERE IS NO INTERSTICE IN FWPCA TO BE FILLED BY THE FEDERAL COMMON LAW.

The question in this case is whether and to what extent the former federal common law has been modified, limited or superseded by federal legislation and regulations adopted since *Illinois* v. *Milwaukee, supra.* Respondents and their supporting amici repeatedly assert that the federal common law of interstate water pollution is interstitial with respect to FWPCA. However, interstitial federal common law can only fill an interstice in a statutory enactment. Because the federal statutory and regulatory scheme of FWPCA provides the manner in which sewer overflows shall be dealt with, there is no interstice for federal common law to fill in this case.[3]

Interstitial common law by its very nature carries out the policy of a statute. It is really a statutory creature. How then can the EPA and the Solicitor General, speaking for the EPA in support of Illinois, take the position that while EPA is required to fund FWPCA requirements, it need not fund the requirements of the so-called interstitial federal common law remedies because they exceed FWPCA requirements?[4] The argument is a contradiction in terms.

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[3] Section 505(e) of FWPCA (§ 1365(e)) neither preserves nor creates an interstice where none exists. It merely provides that the procedural requirements applicable to "citizen suits" as set forth in the immediate preceding subsections of Sec. 505 do not restrict rights which persons may have under any statute or the common law. See pp. 7-8, *infra.*

[4] This contradictory position is exemplified by the following statements: "The order requires petitioners to construct substantial sewage treatment and storage facilities in addition to the

If the remedy is "interstitial," it is within the statute; it cannot exist outside the statute and be independent thereof.

Milwaukee's federally authorized discharge permits and the Dane County Order, which enforces the permits [5] and also imposes requirements under Wisconsin's geographic sovereignty, specify the approach to and parameters for the control of the various point source discharges (overflows) in Milwaukee's sewerage system, including combined sewer overflows ("CSO's"). P.Ex. 62, P.Ex. 63, P.Ex. 64, App. 371-454, Tr. 257; P.Ex. 1311, App. 454-488, Tr. 9417. See also Milwaukee initial brief at 11-14.

Under FWPCA, the State of Wisconsin can and does deal with the overflow points through the Wisconsin DNR, which acts as a permit-issuing agent of the federal government, functioning within the statutory and regulatory framework of FWPCA. Section 402 (§ 1342). Wisconsin also can and does deal with those overflows independently under Wisconsin's reserved territorial sovereignty over domestic dischargers discharging within the State of Wisconsin. (See Sec. 510 of FWPCA (§ 1370).) The Dane County Order resulted from the simultaneous exercise of Wisconsin's reserved territorial sovereignty over a domestic discharger and its enforcement of the federally authorized permits. Thus Milwaukee's overflows are subjected to

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facilities that petitioners must in any event build to comply with existing Clean Water Act regulations." (Solicitor General's Brief at 12) "EPA and petitioners are currently disputing whether and to what extent federal funds will be available to defray the cost of the sewage treatment works ordered by the court below. See note 9, supra." (Solicitor General's Brief at 13n.25)

[5] In 1976, Milwaukee commenced an action in the Dane County, Wisconsin Circuit Court seeking a declaratory judgment that the Wisconsin DNR's regulation prescribing effluent limitations for publicly owned treatment works was unlawfully promulgated. The DNR counterclaimed, seeking a mandatory injunction. The counterclaim resulted in the Dane County Order, pursuant to which Milwaukee must spend hundreds of millions of dollars upgrading its sewerage system. Note that the amounts in controversy in this action—at the very least $300 million—are in addition to required expenditures under the permits as enforced by the Dane County Order and the other provisions of the Order.

the precise concurrent jurisdiction envisioned by FWPCA. Can it be said that compliance with these pervasive mandates under FWPCA leaves the permittee subject to additional, costly requirements imposed by a federal court acting within a statutory interstice?

III. SECTION 505(e) NEITHER PRESERVES NOR CREATES ANY RIGHTS, AND SECTION 510 IS INAPPLICABLE BECAUSE ILLINOIS IS NOT ATTEMPTING TO REGULATE ONE OF ITS OWN DISCHARGERS.

Illinois argues at pages 42-45 of its brief that Sec. 505(e) of FWPCA (§ 1365(e)) shows congressional intent to "preserve" state law and federal common law remedies.[6] It does not. Section 505(e) only provides that the procedural requirements of the citizen suit provisions of Sec. 505 do not "restrict" the right to seek relief under any statute or the common law. Significantly, Sec. 505(e) neither identifies the applicable statutory or common law to which access is not restricted, nor does it specify any right under any statute or the common law as being a right that is preserved. At most, Sec. 505(e) contemplates the existence of a dynamic body of statutory and common law outside of FWPCA which is responsive to the ever changing needs of society—not a static body of immutable rules frozen forever by the adoption of FWPCA. Clearly Sec. 505(e) was not meant to prevent the courts from fashioning or modifying the common law from time to time as appropriate, and as a part of that common law process

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[6] To the extent Illinois bases its legislative intent argument upon an asserted consistent pattern of lower court decisions, it is guilty of gross oversimplification. See Milwaukee's initial brief at 57n.20. Illinois would also ascribe legislative intent to a typewritten draft of a possible amendment to FWPCA discussed in two extra-record letters, one from a Senator from Illinois and one from an Assistant Attorney General. They relate to a proposal by a Congressman who was not a member of the joint conference committee then considering FWPCA. The typewritten draft was never introduced. It was never discussed by any committee of either house of Congress. It does not appear anywhere in the Congressional Record. Such is not the character of documentation establishing legislation.

to determine whether and to what extent the application of other statutes or common law is appropriate in any particular instance or in any particular class of cases.

Where, as here, legislative and regulatory developments make inappropriate the continued application of particular elements of preexisting law, the courts may act on that conclusion. Sec. 505(e) preserves nothing; it only provides that the procedural requirements of Sec. 505 do not "restrict" access to the law that may exist from time to time.

At page 40 of its brief, Illinois argues that Milwaukee has ignored Sec. 510 of FWPCA (§ 1370). Section 510 merely allows the states to exercise such rights as they may have over dischargers located within their respective geographical jurisdictions. Section 510 does not preserve or create any right to use state statutes or state common law to regulate out-of-state discharges to interstate waters. This is a right the states never had. Any right to control out-of-state discharges to interstate waters must be and is grounded only in federal law.

IV. ILLINOIS' WATER QUALITY ARGUMENT IS MISLEADING.

Illinois misleadingly cites out of context part of Milwaukee's draft Facilities Plan (P.Ex. 35) and Milwaukee's 1980 Facilities Plan (which is not in the record), claiming that Milwaukee's planned solution to combined sewer overflows "will continue to cause water quality standards violations." Illinois' Brief at 51. Other parts of the 1980 Facilities Plan not cited by Illinois show that Illinois is wrong. Moreover, the cited material deals with water quality in *rivers* in Milwaukee, not in the lake. Thus, the material relied on by Illinois does not deal with Lake Michigan water quality, and it certainly does not deal with water over which Illinois can exercise jurisdiction.

A complete review of the 1980 Facilities Plan (which occupies approximately 4 feet of shelf space) shows that *any* water flow (no matter how clean) into the rivers may stir up sediment which adversely affects water quality in the rivers. Thus, because of the presence of storm water

runoff in both the CSO and the separated sewer areas, the complete elimination of all sewer overflows may not achieve water quality standards *in the rivers*. Measures recommended by the Southeastern Wisconsin Regional Planning Commission (1980 Facilities Plan Vol. I-C at 12-30 through 34, Feb. 1980), such as dredging six feet of accumulated silt from the rivers and identifying point and nonpoint sources of discharge along the river not owned or controlled by any of the petitioners, are necessary to achieve water quality standards in the rivers and *are endorsed* by the 1980 Facilities Plan.

V. COST-BENEFIT ANALYSIS IS AN INTEGRAL PART OF FWPCA.

In its original brief at 63-65, Milwaukee explained how FWPCA reflects Congress' intent that costs and the availability of federal funding be considered in water pollution control determinations. Milwaukee, amici in support of Milwaukee, the GAO, and EPA's own FWPCA grant administrators are all conspiring, Illinois says, to mislead this Court about FWPCA's concern for the disproportionate costs of requiring progressively higher degrees of pollution control. Illinois Brief at 55. Illinois is wrong.

Both the express language of FWPCA and the legislative history demonstrate that costs and the availability of federal funding should be taken into account in assessing how far this country should go to control water pollution and the appropriateness of alternative water pollution control measures. For example, FWPCA states that in determining what constitutes "best practicable control technology currently available", required by Sec. 301(b)(1) (§ 1311(b)(1)), EPA shall consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved" together with other factors such as the age of the facilities involved, the process employed, non-water quality environmental impacts, etc. Section 304 (b)(1)(B) (§ 1314(b)(1)(B)).

When determining what constitutes "best available technology economically achievable", required by Sec. 301(b)

(2) (§ 1311(b)(2)), EPA must consider "the cost of achieving such effluent reduction" as well as the age of the facilities involved, non-water quality environmental impacts, etc. Section 304(b)(2)(B) (§ 1314(b)(2)(B)). Senate Report 92-414 explains that this requires "that the technology must be available at a cost and a time which the Administrator determines to be reasonable. . . ." *Legislative History* at 1470.[7]

Before EPA may establish any "water quality related effluent limitation" under Sec. 302 (§ 1312), it must notice and hold a public hearing

> "to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter). . . ." Section 302(b)(1) (§ 1312(b)(1)).

FWPCA further provides that the proposed water quality related effluent limitation shall not become effective if the person affected by the limitation demonstrates at such hearing that "there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) . . . ." Section 302(b)(2) (§ 1312(b)(2)).

In its 1977 Amendments to FWPCA, Congress directed EPA to establish standards for the control of "conventional pollutants" (including BOD, suspended solids, fecal coliform, and pH). Section 304(a)(4) (§ 1314(a)(4)) added by P.L. 95-217 Sec. 48(a)). In determining what constitutes "best conventional pollutant control technology" EPA must consider "the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived" as

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[7] All citations to the legislative history are to "A Legislative History of the Water Pollution Control Act Amendments of 1972," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Committee Print 1973).

well as various other factors. Section 304(b)(4)(B) (§ 1314 (b)(4)(B) (added by P.L. 95-217 Sec. 48(b)).[8]

Congress recognized that the process of balancing costs and benefits under FWPCA would often involve difficult questions and subtle judgments. It perceived a lack of existing techniques for measuring relative social benefits and costs in this area, and to remedy that deficiency enacted Sec. 104(a)(6) (§ 1254(a)(6)). That section requires EPA to "initiate and promote the coordination and acceleration of research designed to develop the most effective practicable tools and techniques for measuring the social and economic costs and benefits of activities which are subject to regulation under [FWPCA]. . . ."

Likewise, each state was required to submit to EPA by April 1, 1975, and bring up to date by April 1, 1976 and biannually thereafter, a report including, among other things, an estimate of the environmental impact, the economic and social costs necessary to achieve the objective of FWPCA, and the economic and social benefits of such achievement. Section 305(b)(1)(D) (§ 1315(b)(1)(D)).

The legislative history is replete with evidence of the intent that costs be considered in determining what level of control should be imposed. See, e.g., *Legislative History* at 1116-1118, 1120, 1127-1128, 1221-1222, 1257-1258, 1272, 1281-1283, and 1405-1406. During the Senate debate on FWPCA, then Senator Muskie observed that the drafters did not want to impose "impossible goals", nor did they intend to require "expenditures so excessive that they would undermine our economy." Senator Muskie stated:

> "Consequently, under the proposed legislation, controls must relate the economic and social benefits to be gained with the economic and social costs to be incurred. I mentioned this earlier, in speaking of the

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[8] Note that CSO discharges are regulated under those sections of FWPCA described above. They are not considered publicly owned treatment works for purposes of Sec. 301 of FWPCA (§ 1311). See 40 CFR § 122.3(bb) 45 F. Reg. 33423 (1980) (to be codified at 40 CFR § 122.3) 40 CFR § 125.3(c)(2); 40 CFR § 133.103(a). The Solicitor General is in accord. See Solicitor General's Brief at 7.

> individual members of the committee, that Senator Bentsen constantly and correctly called our attention to the impact and the cost of these programs, being strongly for them, but recognizing them as a part of our total economy." *Legislative History* at 1272.

Senator Bentsen's views on the legislation which he helped draft are instructive:

> "I strongly support the strategy of attempting to control the discharge of effluents. I was concerned, however, that, in its earlier language, the bill was disregarding the economic and social costs inherent in such a massive program of water pollution control.
>
> . . .
>
> Accordingly, while I have some reservations about the attainability of the target dates for a no-discharge policy of pollution control—even as a statement of policy—I am pleased to see language in various sections of the bill which recognizes that there are economic considerations involved in a determination of effluent limitations and water quality standards." *Id.* at 1281.

The foregoing demonstrates that Congress intended cost-benefit analysis and the availability of federal funding to be considered in making water pollution control determinations.[9] The position of Congress on that basic issue

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[9] Members of this Court have recognized the cost sensitivity of FWPCA. *See Industrial Union Dept., AFL-CIO* v. *American Petroleum Inst.*, —— U.S. ——, 48 L.W. 5022 (July 2, 1980), where Mr. Justice Marshall for the dissent said: "It is useful to compare the Act [OSHA] with other regulatory statutes in which Congress has required a showing of a relationship between costs and benefits or of an 'unreasonable risk.' In some statutes Congress has expressly required cost-benefit analysis or a demonstration of some reasonable relation between costs and benefits. See . . . 33 U.S.C. § 1314b(4)(B) (Clean Water Act)." —— U.S. at n.27, 48 L.W. 5049n.27.

Milwaukee firmly believes there is no interstice remaining in FWPCA to be filled by the federal common law in this case. (See pp. 5-7, *supra*) However, if the Court concludes an interstice remains, it should be clear that any remedy imposed pursuant to the federal common law must comply with the policy established by FWPCA, and must therefore be a *cost-beneficial* remedy. By its

reflects a federal interest in costs, an issue which Illinois considers when Illinois is affected but would ignore when Wisconsin is affected.[10]

In this context Illinois falsely implies that the record contains evidence of the cost of eliminating combined sewer overflows and that such evidence shows the cost to be reasonable. Illinois' Brief at 56-57. In fact, the record is absolutely devoid of any evidence concerning the cost of implementing the District Court's total elimination remedy.

The evidence to which Illinois refers relates to Milwaukee's preliminary estimate of the cost of *controlling,* not *eliminating,* CSO discharges. Tr. 10916-10919, D. Ex. 1348 at Item 14. Even the District Court recognized that there was nothing in the record concerning elimination of CSO discharges. In its decision the District Court observed that Milwaukee's engineering consultants were planning to control, not eliminate, CSO discharges. Referring to the "Combined Sewer Overflow Study" (P. Ex. 23-30), the District Court said: "What I find is reference to 'control' of the overflows and 'reduction' of overflows." Pet. App. F-25. The court then proceded to hold that "all overflows must be eliminated." *Id.* The District Court had no idea of the economic burden its mandate would impose, and foreclosed any inquiry on that point: "[T]he cost of eliminating the overflows is not really a factor here"; and "The terms of this order are binding upon the defendants whether or not federal financial assistance becomes available." Pet. App. F-28.[11]

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very nature, interstitial federal common law must carry out the policy of the statute of which it becomes a part.

[10] Illinois misleadingly claims at page 53 of its brief that it "requires combined sewer discharges to achieve water quality standards" under FWPCA. What Illinois fails to tell the Court is that Illinois' regulations condition that requirement upon receipt of federal funding and, in any event, *deem* that requirement met when certain treatment—which is *less stringent* than the District Court requirements—is provided. See discussion of the pertinent Illinois regulations in Milwaukee's initial brief at 80-85.

[11] In this context it must be recognized that Illinois advances two fundamental misrepresentations. Illinois states that Milwaukee

VI. THERE IS NO EMPIRICAL EVIDENCE OF A DANGER TO HEALTH.

In its initial brief, Milwaukee pointed out that there is no empirical evidence in the record supporting a conclusion that Milwaukee's actions present a health hazard, and that there is strong evidence to the contrary.[12] There is no showing of even a single pathogen from Milwaukee or anywhere in the waters of respondents (though the water is out there for examination), and there is no showing of any outbreak of water-bourne diseases in Milwaukee, which draws its drinking water from intakes very near the sewage outfalls complained of, or in Illinois, which is far removed from Milwaukee's outfalls. This fact exists through a one hundred year history even though the diseases Illinois claims to be exposed to have short incubation periods. Regarding this aspect of Illinois' case the District Court stated:

> "In so electing [not to analyze Lake Michigan water for pathogens] it is my opinion that *the state* [*Illinois*] *chose to produce less evidence than it should have.* My guess as to why they elected not to conduct their own

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selected and ordered remedy for overflow elimination by stipulation and that cost evidence shows that the remedy ordered was not overly burdensome. In fact, Milwaukee and Illinois stipulated only to what was the engineering equivalent of a remedy already ordered by the District Court (Petitioners' Reply Brief on Petition for Certiorari at 4-5). As explained above, the cost evidence referred to by Illinois did not relate to the remedy ordered; rather, it related, as the District Court said, to a controlled overflow system and not to the presently ordered drastic remedies requiring total elimination.

[12] Milwaukee draws attention to Illinois' mischaracterization of a number of its contentions on this subject as "undisputed" when in truth they were and are contested. Milwaukee particularly objects to Illinois setting up its arguments and misstatements of asserted fact as though they were quoations of findings of the courts below. Illinois' Brief at ii-iii. They are neither quotations nor findings. As pointed out in Milwaukee's initial brief at 69-80, nowhere does Illinois point to support in the record for its assertions. Nowhere is there anything but speculations of experts without support of empirical evidence. For Illinois to characterize its contentions as "undisputed" is absolutely contrary to fact.

study is that they were afraid of a negative result. Conducting such studies is dangerous, because, of course, they cut both ways; but if the position of the State of Illinois is correct, as I believe it is, a properly conducted study should have resulted in *some circumstantial* evidence that would tend to confirm that *theory.*" (Pet. App. F-10) (Emphasis added.)

The January 1974 *Annual Report Of The Administrator Of The Environmental Protection Agency To The Congress Of The United States In Compliance With Section 26(a) Of The Federal Water Pollution Control Act* at 12 reflects the extremely tenuous nature of Illinois' contentions:

> "*An assessment of health hazards from polluted water involves considerable uncertainty.* There is little doubt that human feces carry infectious pathogens for a number of intestinal diseases, typhoid fever, hepatitis, brucellosis, encephalities, poliomyeliteis, psittacosis, and tuberculosis. *However, there are grave uncertainties about the die-off rates of pathogens in natural waters as well as their infectiousness for swimmers or other recreational water users.* Note that the issue of drinking water is not at stake, since its safety depends on disinfection treatment by the water supply system. *The evidence* that *water polluted with fecal matter can transmit diseases to swimmers is sparse and uncertain,* particularly since it has been discovered that swimmers in unpolluted water also have higher incidences of common ear, eye, and nose infections." (Emphasis added.)

Illinois at pages 6 and 16 of its brief states that Illinois is currently suffering fecal contamination of its northern beaches, and its residents are suffering enteric bacterial and viral diseases, citing transcript and exhibit references. Milwaukee does not claim there is no fecal contamination or enteric disease in Illinois. What Milwaukee says is this: (1) Illinois permits discharges of raw and inadequately treated sewage to waters in Illinois and Lake Michigan; (2) Illinois does not have enteric diseases at levels different from those found in any other area of the country; (3) no pathogen has been shown to come to Illinois from

Wisconsin, much less from Milwaukee;[13] and (4) the major source of transmission of enteric diseases is on a person-to-person basis; this occurs more frequently than through water transmission, and Illinois' enteric diseases are not shown to have been water-bourne. All of Milwaukee's positions, excepting only the lack of any evidence of pathogens coming from Milwaukee, are shown by the very references that Illinois cites at pages 6 and 16 of its brief!

Instead of relying upon empirical evidence, Illinois relies upon the *speculated possibility* that some disease *might* occur if a whole series of hypothetical circumstances and events come together in the correct order and relationship to one another.[14] As Milwaukee pointed out in its initial brief at 69-80, this Court has dismissed past interstate water pollution cases for a failure of proof on the same type of evidence, i.e., conflicting expert testimony in the absence of empirical evidence.

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[13] The Wisconsin cities of South Milwaukee, Racine and Kenosha, which are located closer to Illinois than Milwaukee, were originally defendants in this case. They were dismissed by the District Court upon the basis of stipulations with Illinois which do not require complete elimination of overflows and which are conditioned upon the receipt of federal funding. See Design Commitment Agreements between Illinois, Michigan and (1) City of South Milwaukee, filed Jan. 12, 1977; (2) City of Racine, filed Nov. 1, 1973; and (3) City of Kenosha, filed Nov. 1, 1973.

[14] At pages 6 and 7 of its printed brief, Illinois cites the report made to this Court by Special Master Albert Maris in another case. (The report was not cited in Illinois' original typewritten brief.) Illinois' quotations are taken out of context and its implications are unsupported. Under the heading "Effect On Lake Michigan of Sewage Effluent Return", the report discussed the effect of the Sanitary District of Chicago discharging 750 cubic feet per second of treated sewage to the lake. In this context the report reviewed the local effects during low wind conditions in which the effluent from the Chicago district would move as an almost undiluted mass to the Chicago water intakes. It is Chicago's discharge under such conditions that the report found should be avoided "if an alternative method of disposing of the contaminant is available" (Master's Report at 203-205).

In essence, the courts below, like OSHA in *Industrial Union Dept., AFL-CIO* v. *American Petroleum Inst., supra* n.9, postulated a danger they considered potentially present and fashioned a remedy regardless of cost or other considerations. In the *Industrial Union* case, the postulated danger was a carcinogen. OSHA's response, in the absence of proof of a safe level for the carcinogen, was to establish as a standard a level that was "technologically feasible and that 'the economic inpact of . . . [compliance with which] will not be such as to threaten the financial welfare of the affected firms or the general economy.'" 48 L.W. at 5030. The danger postulated by the courts below was waterbourne diseases. Without empirical proof of danger, or any evidence regarding costs, the lower courts required elimination of all overflows. They did not even consider costs to the extent of determining whether the economic viability of the municipal defendants was threatened. To the courts below, "the cost of eliminating the overflows is not really a factor here." Pet. App. F-28.

VII. RESPONDENTS SEEK TO IMPOSE CONTROLS TO WHICH THEY DO NOT ADHERE.

At pages 80-86 of its initial brief, Milwaukee pointed out that neither Illinois nor Michigan require the level of control of overflows ordered by the courts below. Michigan makes no response, and Illinois at page 47 of its brief says it has or will eliminate all discharges to Lake Michigan. The record is contrary. Tr. at 4026-4034, 13444-13445, 13450; D. Ex. 170 at 9; see also, GAO, *Report by the Comptroller General of the United States: Combined Sewer Flooding and Pollution—A National Problem. The Search for Solutions in Chicago,* CED 79-77 (May 15, 1979) Vol. 1 at 18. Chicago and Waukegan periodically overflow, with Chicago overflowing sometimes in excess of one billion gallons of untreated sewage to Lake Michigan![15]

[15] Illinois admitted the continuation of its overflows as a fact in this Court in its Supplemental Response of the State of Illinois to Applicants' Motion for Stay Pending Certiorari at 6-7, May 7, 1980.

Chicago is seeking federal funding for its TARP project, which, even if completed, will neither eliminate overflows nor meet water quality standards. *Id.* at 4-5.

Additionally, Illinois' regulatory position in respect of all of its *intrastate* waters, where protection of its citizens should be of most serious concern to the State of Illinois, is not commensurate with the level of effluent purification Illinois would impose on Milwaukee located at least 25 miles away. Respondents' approach throughout this case has been and continues to be "Do as we say, not as we do," an approach which this Court condemned more than 70 years ago. See *Missouri* v. *Illinois, supra,* 200 U.S. at 522.

VIII. *IN PERSONUM* JURISDICTION IS LACKING.

Milwaukee submits that however the federal courts exercise substantive jurisdiction, *in personam* jurisdiction remains as an impossible hurdle for the respondents to overcome in view of the location of the forum *they have chosen.* As Milwaukee pointed out in its initial brief herein, the only basis for *in personam* jurisdiction is the assertion of the presence of the minimal contacts necessary to sustain long-arm jurisdiction, and they are not present. On that subject Milwaukee relies on its initial brief at 86-87.

IX. ILLINOIS' ARGUMENT ON VENUE IS BASED UPON A MISQUOTATION OF THE CRITICAL UNITED STATES SUPREME COURT DECISION.

Despite the complete overhaul of its brief, Illinois continues to rely, with respect to the venue question, on a misquotation of this Court at page 66 of its brief. In *Leroy* v. *Great Western United Corp.,* 443 U.S. 173, 185 (1979), this Court actually said:

> "In our view, therefore, the broadest interpretation of the language of § 1391(b) that is even arguably

> acceptable is that in the unusual case in which it is not clear that the claim arose in only one specific district, [footnote omitted] a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility—*in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but not of the plaintiff)*—may be assigned as the locus of the claim." (Emphasis on "not" in original; other emphasis added.)

In its misquotation Illinois leaves out the italicized clause, without even indicating that it has done so. This clause is exceedingly significant to this case. Even if Illinois is correct that the claim here involved had its locus in more than one district (not conceded by Milwaukee—see pages 88-89 of Milwaukee's initial brief), Illinois still has selected the wrong forum. The Northern District of Illinois demonstrably does not conform to any of the criteria found in the omitted clause. It was not the forum of convenience for the defendants. The witnesses were not particularly available there, and the evidence was not particularly accessable there. Instead, the forum was sought for the convenience of Illinois, regardless of the other factors present.

Illinois' reliance upon its state law claims to bolster its venue argument is misplaced. (See pp. 2-5, *supra.*)

CONCLUSION

For all the reasons stated herein and in its initial brief, Milwaukee should be granted the relief requested at 90-91 of its initial brief.

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